United States Court of Appeals

for the Second Circuit

PETITIONER'S REPLY BRIEF

No. 74-1361

In the

United States Court of Appeals

For the Second Circuit

ALLSTATE INSURANCE COMPANY,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION TO REVIEW AND SET ASIDE A DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD.

REPLY BRIEF OF ALLSTATE INSURANCE COMPANY

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I. INTRODUCTORY STATEMENT

In its principal brief, Allstate argued that the Order of the Board, based on its finding of a violation of Section 8(a)(1) of the National Labor Relations Act, should be set aside and denied enforcement. This contention was based on the following propositions:

First, that no substantial evidence on the record as a whole exists to support the Board's finding that the Company violated Section 8(a)(1).

Second, that the Board's decision failed to articulate the reasons for its order, in contravention of the Administrative Procedure Act (5 U. S. C. § 557), thereby precluding meaningful judicial review.

Third, that the Board's decision was internally inconsistent and constituted error as a matter of law by failing to conclude, or even consider, that the evidentiary factors which caused it to dismiss the alleged violation of Section 8(a)(3) were precisely the same factors that infected the findings of a violation of Section 8(a)(1).

The Board's appellate counsel, in responding to this analysis, disregarded the second and third issues and neglected to address himself to them in his "Counterstatement of the Issue Presented". In so doing, the Board has tacitly conceded these issues. Since each of the Company's contentions offers an independent justification for denying enforcement of the Board's order, such a substantial concession dictates a decision for the Company.

The Board's brief attempts to answer only one issue raised in this matter: the substantial evidence issue. In so doing the Board seeks to bootstrap the unsupported testimony of Hansen (the only evidence offered as to Section 8(a)(1) violations) by using what we respectfully submit to be an ersatz theory of background evidence (which is itself mischaracterized and unsupported). While it is well settled that background evidence may be used to assess the *significance* of acts committed, it would determine the rationale behind the use of such evidence to allow it to be used to establish the commission of those acts as the Board's brief proposes. Moreover, the unsupported testimony of Hansen, an untrustworthy and interested witness, is of limited probative value and veracity, and certainly falls short of being "substantial evidence" to support a finding that Allstate violated Section 8(a)(1) of the Act.

II. ARGUMENT

1. NO SUBSTANTIAL EVIDENCE EXISTS TO SUPPORT ANY OF THE BOARD'S FINDINGS OF UNLAWFUL ACTIVITY

In suggesting that the only issue presented by this appeal is whether substantial evidence on the record, considered in its entirety, supports the Board's findings, the Board's brief virtually ignores the other important issues in this case: i.e., the internal inconsistency of the Board's opinion and its failure to articulate reasons for its order. Moreover, even on the only issue that it chose to contest, the Board cannot prevail.

(a) Background Evidence Cannot Prove Operative Facts

The attempted utilization of background evidence in the Board's brief must be rejected for it rests on an erroneous reading and a fallacious interpretation of the general rule. To be sure, "it is well settled that the Board may consider them (incidents occurring outside the sixth-month time limit of section 10(b) of the Act) as relevant background evidence in *assessing the significance of acts committed* within six months of the charge and alleged to be unlawful" (Bd. br. p. 8). (Emphasis added.) Here, however, the Board offers background evidence (which is itself mischaracterized and unsubstantiated)[1]

1. The Board's blatant misconstruction of testimony becomes obvious on close inspection. *First*, as stated, the Company and its managers did not favor unionization, but only because they felt that it would not be in the best interest of either the employees or the employer. (A. 211.) However, taking such a position is certainly not illegal: an employer has "the right to express his opinions on the controversy" with a union and to advance arguments against the union "as long as no intimidation or coercion was indulged in, or benefits promised, or threats made, express or implied." *NLRB* v. *Armco Drainage and Metal Products*, 220

not to "shed light on the *true character* of matters occuring within the limitations period"[2] (emphasis added), but to purportedly establish that those acts in fact occurred.

If substantial evidence documented the factual certainty of the occurrence of certain events, background evidence would be appropriate in assessing the significance of those events. That is just the type of situation presented in the cases cited by the Board's brief. In *NLRB* v. *National Shoes*, 208 F. 2d 688 (2nd Cir. 1953), the facts were not disputed. The only question was "good faith". The background evidence was appropriately admitted on that issue to evaluate the various bargaining

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F. 2d 573 (6th Cir. 1955), *cert. den.*, 350 U. S. 838 (1955). See also Section 8(c) of the Act. *Second*, what the Board's brief describes as "an elaborate system for detection" in regard to unionization efforts was simply a normal flow of information through the management of the Company. To be sure, managers reported on "anything that's going to disrupt the work." (A. 298.) But, these exchanges, even though occassionally involving aspects of labor relations, in no way constitute "illegal actions designed to defeat or thwart those activities". The admonition of the Supreme Court in *Textile Workers* v. *Darlington Mfg. Co.*, 380 U. S. 263 (1965) is most apropos: "Whatever may be the limits of § 8(a)(1), some employer decisions are so peculiarly matters of management prerogative that they would never constitute violations of § 8(a)(1) . . . unless they also violated § 8(a)(3)." Communications among members of the management team must certainly fall within both the letter and the spirit of this holding. *Finally*, Cartiglia's attempts to listen to grievances were not prompted solely by the advent of the union. It was simply an effort to "calm it down" and to get the employees "back to their jobs settling claims". (A. 275). Such action is well within the scope of his rights: "It is plainly not unlawful for an employer to hold a "gripe session" during a union campaign; an organizational drive often comes as a rude shock to an employer, and a simple offer to hear any complaints the employees may have, or to set up machinery to that end, is a natural and non-coercive response." *NLRB* v. *Rollins Telecasting*, 494 F. 2d 80, 83 (2nd Cir. 1974). See also *F. C. F. Papers*, 211 NLRB No. 67 (1974).

2. *Local No. 1424, International Association of Machinists* v. *NLRB*, 362 U. S. 411, 416 (1960).

positions. In *NLRB* v. *Lundy Mfg. Corp.*, 316 F. 2d 921 (2nd Cir. 1963), the background was offered merely to assist in determining the appropriate remedy. Thus, neither of those cases can be construed to stand for the proposition that background evidence may be introduced to prove the operative facts of an allegation.

Here, background evidence is being put forward not to show that conversations already established were actually coercive or that established statements were made with anti-union animus but to prove that such conversations actually took place and that alleged statements really were delivered.[3] In other words, the Board's brief is attempting to utilize what it characterizes as background evidence in an effort to furnish a belated justification for the Board's unsupported conclusions on controverted issues of fact which turn upon critical credibility resolutions. Such usage of background evidence is singularly inappropriate and totally without precedent.

(b) Countervailing Evidence Must Be Considered

Moreover, the "substantiality of the evidence must take into account whatever in the record fairly detracts from its weight". *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474, 495 (1951). In the instant case, the Board's brief (like the opinion of both the Board and of the Administrative Law Judge) relies entirely on the unsupported testimony of Hansen to document each separate allegation of 8(a)(1) violations. (Bd. br. p. 8-10.) The Company in its brief (br. p. 24-30) authoritatively documents the lack of substance and significance in each of these allegations. Moreover, it is important to note that Hansen's testimony is not deserving of substantial weight: he was lawfully

3. The statements referred to are those which Hansen claimed were made to him by Company managers and supervisors, which the parties involved denied having made. It is important to note that the entire 8(a)(1) allegation is based on these statements.

dismissed for dishonesty (A. 63-64); he contradicted himself in his sworn testimony (A. 122-125); his version of each incident was refuted by "the clear and consistent testimony" of other witnesses (A. 61, 163-164, 169-172, 192-193); and the Board itself found his testimony "confused and inconclusive". (A. 61.)

In short, the Board's 8(a)(1) findings are based on little more than "suspicion, surmise, implication [and] plainly incredible evidence" *Universal Camera, supra,* at 484. In refusing to account for any countervailing considerations, the Board's brief fails to adequately apply the "substantial evidence" rule.

2. THE BOARD'S DECISION FAILS TO MEET THE REQUIREMENTS OF THE ADMINISTRATIVE PROCEDURE ACT

The Board in its brief refuses to meet the issue of the failure of the Administrative Law Judge and the Board to articulate the reasons or basis for their findings and conclusions as required by the Administrative Procedure Act (A. P. A.). This Court should not accept the *ex post facto* explanations contained in the Board's brief as a substitute for those required in its Decision. The Board's brief (Bd. br. p. 11) summarily dismisses the defect contained in the Decisions of the Administrative Law Judge and the Board by stating that they were based essentially on the "observation" of witnesses. Surely this is not a sufficient explanation to meet the requirments of the A. P. A.—especially under the unusual circumstances present here. (See br. pp. 21-24.)

The Board itself stated in *Funkhouser Mills,* 132 NLRB 245, 247 (1961) in referring to the requirements of the A. P. A.: "It was not enough for the Trial Examiner to make mere broad conclusions . . . without setting forth the relevant evidence supporting these conclusions and without an analysis of the evidence, including resolutions of credibility, to show how he arrived at his conclusions." In reversing the Section 8(a)(3) charges,

the Board here made such analysis, thereby correcting the Administrative Law Judge's failure to do so. The A. P. A. requires that a similar analysis and correction be made as to the Section 8(a)(1) charges, which the Board failed to do, notwithstanding the fact that the same compelling reasons existed to correct the Administrative Law Judge's 8(a)(1) conclusions as were stated by the Board in respect to her 8(a)(3) conclusions. Member Kennedy recognized this defect when he correctly stated that the failure of the Administrative Law Judge to "indicate carefully and specifically how [she] arrive[d] at [her] credibility resolutions . . . requires rejection of [those] conclusions". (A. 66.)

3. THE BOARD'S DECISION IS INTERNALLY INCONSISTENT

The Board in its brief (Bd. br. p. 11) misses the thrust of the Company's argument as to the internal inconsistency of the Board's decision. The Company would agree that the Board need not necessarily disbelieve all of a witness' testimony if it disbelieves part. The issue is not the general credibility of the witness, but rather the Board's inconsistent credibility resolution. The Board's failure to make the same analysis with respect to the Section 8(a)(1) evidence that it did with respect to the 8(a)(3) evidence resulted in a conclusion on the 8(a)(1) charge which contradicts the inherent logic of its conclusion on the 8(a)(3) charge. Since the evidentiary factors involved in the two charges are the *same*, the fundamental error in the Board's decision is even more glaring.

The Board has a duty to carefully analyze all (not part) of the evidence and to articulate the reasons or basis for its findings and conclusions on all (not part) of the evidence. It is the Company's contention (as fully explained in its brief) that had the Board properly carried out this duty, it necessarily would have had to conclude, based on the substantial evidence

on the record considered as a whole, that the evidentiary factors which caused it to dismiss the Section 8(a)(3) portion of the complaint were precisely the same factors that infected the Section 8(a)(1) findings, and would compel reversal thereof. (See br. p. 15n. 15.)

The unsupported Hansen testimony in an effort to show commission of Section 8(a)(1) violations was inextricably intertwined with his unsupported attempts to impute improper motive for discharge to the Company in respect to the Section 8(a)(3) charges. If, as the Board concluded, the Administrative Law Judge was wrong in believing Hansen's "confused and inconclusive" testimony and disbelieving the "clear and consistent" testimony of others with reference to discharge motivation, then clearly, upon similar analysis, the Board should have gone on to conclude that the Administrative Law Judge had no reason to believe Hansen's unsupported and thoroughly refuted testimony that Allstate unlawfully questioned and threatened him within the same time frame and context as the lawful discharge.

III. CONCLUSION

For the reasons stated herein, as well as those set forth in its principal brief, Allstate respectfully prays that this Court grant its petition to set aside and deny enforcement to the Board's order.

Respectfully submitted,

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